

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

24 CFR Parts 25, 26, and 202

[Docket No. FR-3065-F-04]

RIN 2501-AB24

Mortgagee Review Board; Proceedings Before a Hearing Officer; Approval of Lending Institutions and Mortgagees; Technical Amendments

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule; technical amendments.

SUMMARY: This rule changes the Department's regulations governing sanctions imposed by the Mortgagee Review Board. The rule also makes conforming changes to the regulations concerning HUD's hearing officers and approval of Title I lenders, consistent with the revisions herein and in the recent revisions to 24 CFR part 24. The changes to the Mortgagee Review Board actions are intended to follow more closely the statutory provisions set forth at 12 U.S.C. 1708(c). These revisions are necessary to comply with the President's directive to streamline agency operations throughout the executive branch. The revisions are also an element in the Government reinvention process at the Department.

EFFECTIVE DATE: August 31, 1995.

FOR FURTHER INFORMATION CONTACT: Emmett N. Roden, Assistant General Counsel for Administrative Proceedings, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10251, Washington, DC 20410, telephone (202) 708-2350. The telephone number for the hearing impaired (TDD) is (202) 708-9300. These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: Section 202(c) of the National Housing Act (12 U.S.C. 1708(c)) established the Mortgagee Review Board (the Board). Section 202(c)(4) directs the Board to "hold a hearing on the record" concerning certain sanctions it has taken against a mortgagee, if the mortgagee so requests within 30 days notice of the Board's action. However, the Department's regulations have delegated the Board's authority to hold hearings to hearing officers (administrative law judges and Board of Contract Appeals judges). These proceedings have proven extremely time-consuming and expensive. Accordingly, this rule provides for the Board to delegate its hearing authority

to a hearing official who will conduct informal hearings under stated time limitations, thereby streamlining the hearing process. The rule further provides that the hearing official may, at his or her discretion, refer matters to an administrative law judge or Board of Contract Appeals judge, or to another "independent" official for findings of fact. The term "independent" means that the other official will not be a member of the Board or employed within an office acting as an advisor to the Board as that term is described at § 25.4(b).

The rule also implements the 1992 amendments to section 202 (Pub. L. 102-550, approved October 28, 1992). These amendments limited the duration of a suspension issued by the Board to one year, unless extended for a period not longer than six months to protect the public interest, or unless extended with the mortgagee's agreement. The amendments also clarified that the term "mortgagee" includes a lender or loan correspondent approved under Title I of the National Housing Act.

In addition, the final rule reinstates a provision of 24 CFR 25.9 that the Department inadvertently deleted by a September 9, 1993 revision to the rule (58 FR 47379). This section (former § 25.9(x)) cited as grounds for an administrative action the failure by a mortgagee to remit, or timely remit, mortgage insurance premiums, loan insurance charges, late charges, or interest penalties to the Department. The final rule revises the current § 25.9(x) and moves the miscellaneous offense provision at § 25.9(w) to a more logical position at the end of § 25.9. The rule also restores provisions limiting discovery in § 25.8 that the Department inadvertently deleted in the proposed rule.

The rule also makes conforming changes to the Department's regulations at 24 CFR parts 26 and 202, governing hearing officers and Title I lenders, respectively, consistent with these revisions to the Board's regulations and revisions to 24 CFR part 24, published in the **Federal Register** June 26, 1995 (60 FR 33037, 33046).

Discussion of Public Comment

On December 20, 1994 (59 FR 65700) the Department published a proposed rule amending 24 CFR parts 25 and 26 of the Code of Federal Regulations. One comment was received, from the Administrative Conference of the United States (ACUS).

Comment: The commenter urged the Department to follow procedures similar to those proposed in Recommendation 95-2, "Debarment and Suspension from

Federal Programs," adopted by ACUS on January 18, 1995. ACUS Recommendation item II recommends that cases involving disputed issues of material fact be referred to administrative law judges, military judges, administrative judges of boards of contract appeals, or similarly independent hearing officers for hearings and preparation of (1) findings of fact, (2) a recommended decision, or (3) an initial decision, subject to agency appeal. Item II of the ACUS Recommendations also recommends that debarring officials be senior agency officials who are guaranteed sufficient independence to provide due process, and that such officials ensure that information used as the basis for a sanction appear in the administrative record of the decision.

Response: It should be noted that Board sanctions are substantially different from suspensions and debarments. Unlike those sanctions, which have Government-wide effect, the most severe Board sanction involves withdrawal of a mortgagee's license, previously granted by the Department, to participate in the insured mortgage programs of the Federal Housing Administration (FHA). Board sanctions are imposed only after the subject mortgagees have received advance notice of the allegations against them and an opportunity to respond to those allegations. A majority of the Board, composed of several of the Department's highest officials, must vote to impose a sanction. Considerable independence is thus statutorily guaranteed with respect to every Board action.

Furthermore, the governing statute provides, at section 202(c)(4)(B), that upon receipt of a request for a hearing "the Board shall hold a hearing on the record * * *." Accordingly, a hearing official must be designated by the Board, and all hearings must be recorded.

However, in response to this comment and to reflect comparable revisions to the Department's final rule on suspensions and debarments, published in the **Federal Register** on June 26, 1995, this rule was revised to adopt procedures similar to the first suggested hearing method in ACUS Recommendation Item II. Thus, a hearing official designated by the Board shall conduct hearings on Board sanctions, and may, at his or her discretion, refer factual disputes to an administrative law judge, member of the Department's Board of Contract Appeals, or other independent official for findings of fact.

Findings and Other Matters*National Environmental Policy Act*

In accordance with 40 CFR 1508.4 of the regulations of the Council on Environmental Quality and 24 CFR 50.20(k) of the Department's regulations, the policies and procedures contained in this rule relate only to administrative decisions, which do not constitute development decisions and do not affect the physical condition of a project area or building. Therefore, this rule is categorically excluded from the requirements of the National Environmental Policy Act.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Secretary hereby certifies that this rule would not have a significant economic impact on a substantial number of small entities. The rule implements statutory authority intended to protect the Department's programs from abusive practices, but it will have no adverse or disproportionate economic impact on small businesses.

Executive Order 12606, The Family

The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that this final rule does not have potential for significant impact on family formation, maintenance, and general well-being. No significant change in existing policies or programs will result from promulgation of this rule, as those policies and programs relate to family concerns. Therefore, the rule is not subject to review under the Order.

Executive Order 12612, Federalism

The General Counsel, as the Designated Official under Section 6(a) of Executive Order 12612, Federalism, has determined that the policies contained in this rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. As a result, the final rule is not subject to review under the Order.

Semiannual Agenda

This rule was listed as item 1379 in the Department's Semiannual Agenda published on May 8, 1995 (60 FR 23368, 23369) under Executive Order 12866 and the Regulatory Flexibility Act.

List of Subjects*24 CFR Part 25*

Administrative practice and procedure, Loan programs—housing and community development, Organization and functions (Government agencies).

24 CFR Part 26

Administrative practice and procedure.

24 CFR Part 202

Administrative practice and procedure, Home improvement, Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements.

Accordingly, 24 CFR parts 25, 26, and 202 are amended as follows:

PART 25—MORTGAGEE REVIEW BOARD

1. The authority citation for part 25 is revised to read as follows:

Authority: 12 U.S.C. 1708(c), 1708(d), 1709(s), 1715b and 1735(f)–14; 42 U.S.C. 3535(d).

2. Section 25.2 is revised to read as follows:

§ 25.2 Establishment of Board.

The Mortgagee Review Board (the Board) was established in the Federal Housing Administration, which is in the Office of the Assistant Secretary for Housing—Federal Housing Commissioner, by section 202(c)(1) of the National Housing Act (12 U.S.C. 1708(c)(1)), as added by section 142 of the Department of Housing and Urban Development Reform Act of 1989 (Pub. L. 101–235, approved December 15, 1989). Except as limited by this part, the Board shall exercise all of the functions of the Secretary with respect to administrative actions against mortgagees and lenders and such other functions as are provided in this part. The Board may, in its discretion, approve the initiation of a suspension or debarment action against a mortgagee or lender by any Suspending or Debarring Official under part 24 of this subtitle A. The Board shall have all powers necessary and incident to the performance of these functions. The Board may redelegate its authority to review submissions and conduct hearings under § 25.8. The Board may also redelegate its authority to impose administrative sanctions on the grounds specified in §§ 25.9 (e), (h), and (u), and to take all other nondiscretionary acts. With respect to actions taken against Title I lenders and loan correspondents, the Board may redelegate its authority to

take administrative actions for failure to remain in compliance with the requirements for approval in 24 CFR 202.3(j), 202.4(a), 202.5 (a) and (c), and 202.6 (a) and (e).

3. In § 25.3, definitions for “*Hearing officer*” and for “*Hearing official*” are added in alphabetical order, to read as follows:

§ 25.3 Definitions.

* * * * *

Hearing officer. An Administrative Law Judge or Board of Contract Appeals judge authorized by the Secretary, or by the Secretary's designee, to issue findings of fact or other appropriate findings under § 25.8(d)(2).

Hearing official. An official designated by the Board to conduct hearings under § 25.8.

* * * * *

4. Section 25.5 is amended by revising paragraphs (c)(1), (c)(2), and (d)(4)(iii), to read as follows:

§ 25.5 Administrative actions.

* * * * *

(c) *Suspension*—(1) *General.* The Board may issue an order temporarily suspending a mortgagee's HUD/FHA approval if there exists adequate evidence of violation(s) under § 25.9 and continuation of the mortgagee's HUD/FHA approval, pending or at the completion of any audit, investigation, or other review, or such administrative or other legal proceedings as may ensue, would not be in the public interest or in the best interests of the Department. Suspension shall be based upon adequate evidence.

(2) *Duration.* A suspension shall last for a specified period of time, but not less than 6 months and generally not more than 1 year. The Board may extend the suspension for an additional 6 months if it determines that the extension is in the public interest. These time limits may also be extended upon the voluntary written agreement of the mortgagee.

* * * * *

(d) * * *

(4) * * *

(iii) Upon receipt of the Board's decision under § 25.8(e).

* * * * *

5. Section 25.7 is revised to read as follows:

§ 25.7 Notice of administrative action.

Whenever the Board takes an action to issue a letter of reprimand, to place a mortgagee on probation, or to suspend or withdraw a mortgagee's approval, the Board shall promptly notify the mortgagee in writing of the

determination. Except for a letter of reprimand, the notice shall describe the nature and duration of the administrative action, shall specifically state the violations, and shall set forth the findings of the Board. The notice shall inform the mortgagee of its right to a hearing, pursuant to § 25.8, regarding the administrative action (except for a letter of reprimand) and of the manner and time in which to request a hearing. A supplemental notice may be issued in the discretion of the Board to add or modify the reasons for the action.

6. Section 25.8 is revised to read as follows:

§ 25.8 Hearings and hearing request.

(a) *Hearing request.* A mortgagee that is issued a probation, suspension, or withdrawal action is entitled to a hearing on the record. The mortgagee shall submit its request for a hearing within 30 days of receiving the Board's notice of administrative action. The request shall be addressed to the Board Docket Clerk, Department of Housing and Urban Development, 451 7th Street SW., Washington, D.C. 20410. The request shall specifically respond to the violations set forth in the notice of administrative action. If the mortgagee fails to request a hearing within 30 days after receiving the notice of administrative action, the Board's action shall become final.

(b) *Procedural rules.* The hearing official shall hold a de novo hearing within 30 days of HUD's receipt of the mortgagee's request, unless the mortgagee requests a later hearing date. The mortgagee or its representative shall be afforded an opportunity to appear, submit documentary evidence, present witnesses, and confront any witness the agency presents. The parties shall not be allowed to present members of the Board as witnesses. At the mortgagee's request, a transcribed record of the hearing shall be made available at cost to the mortgagee.

(c) *Hearing location.* The hearing shall generally be held in Washington, D.C. However, upon a showing of undue hardship or other cause, the hearing official may, in his or her discretion, order the hearing to be held in a location other than Washington, D.C.

(d) *Hearing official's recommendation.* (1) The hearing official shall issue written findings and a recommended decision to the Board within 45 days after the conclusion of the hearing, unless the hearing official extends this period for good cause or refers a matter for findings of fact or other appropriate findings pursuant to paragraph (d)(2)(i) of this section. The findings and recommendation shall be

based upon the facts as found, together with any information and argument submitted by the parties and any other information in the administrative record.

(2) *Referral to a hearing officer or other independent official.* (i) The hearing official may, at his or her discretion, refer disputed material facts to a hearing officer or other independent official for findings of fact. The hearing official may also, at his or her discretion, refer other issues to a hearing officer or other independent official for appropriate findings. The hearing official shall provide the parties with notice of the referral. The hearing official may reject the findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(ii) The provisions of part 26 of this subtitle A shall be applicable to proceedings before a hearing officer, with the following limitations:

(A) No appeal to the Secretary may be taken under §§ 26.24 through 26.26 of this subtitle A with respect to any order or decision by the hearing officer.

(B) Discovery shall be limited to exclude requests for answers to interrogatories, requests for admissions, and production of documents that either do not pertain to the appealing mortgagee, or pertain to reviews or audits by the Department or administrative actions by the Board against mortgagees other than the appealing mortgagee. Members of the Board shall not be subject to deposition, nor shall they be required to testify at any hearing.

(iii) Proceedings before a hearing officer or other independent official shall commence within 45 days after referral by the hearing official, unless the parties agree to an extension of time. The hearing officer or other independent official shall issue the requested findings of fact or other appropriate findings to the hearing official within 30 days after the conclusion of such proceedings. The time limitations of this paragraph may be extended upon issuance of a written notice describing good cause for such extension.

(iv) The hearing official shall provide a recommended decision to the Board within 15 days after the findings are issued.

(v) [Reserved].

(e) *Decision by the Board.* The Board shall issue its decision within 15 days after the hearing official issues the recommended decision. The Board's decision shall be mailed to the mortgagee, and shall serve as the final agency action concerning the mortgagee.

7. Section 25.9 is amended by revising paragraphs (i), (w), (x), and (bb), and by adding paragraph (ee), to read as follows:

§ 25.9 Grounds for an administrative action.

* * * * *

(i) Failure or refusal of an approved mortgagee to comply with an order of the Board, the Secretary, the hearing official, hearing officer or other independent official to whom matters are referred under § 25.8(d)(2).

* * * * *

(w) Failure to remit, or timely remit, mortgage insurance premiums, loan insurance charges, late charges, or interest penalties to the Department;

(x) Failure to submit a report required under 24 CFR § 202.19 within the time determined by the Commissioner, or to commence or complete a plan for corrective action under that section within the time agreed upon by the Commissioner;

* * * * *

(bb) Breach by the mortgagee of a fiduciary duty owed by it to any person as defined in § 25.3, including GNMA and the holder of any mortgage-backed security guaranteed by GNMA, with respect to an insured loan or mortgage transaction.

* * * * *

(ee) Any other reason the Board or the Secretary determines to be so serious as to justify an administrative sanction.

§ 25.12 [Amended]

8. In § 25.12, paragraph (a) is amended by removing the words "Hearing Officer," from the fifth sentence, and by adding in their place the words "hearing official," and by removing the last sentence of the paragraph.

9. Section 25.16 is revised to read as follows:

§ 25.16 Prohibition against modification of Board orders.

No hearing official, hearing officer, or other independent official before whom proceedings are conducted under § 25.8 shall modify or otherwise disturb in any way an order or notice by the Board.

§ 25.17 [Removed and reserved]

10. Section 25.17 is removed and reserved.

PART 26—PROCEEDINGS BEFORE A HEARING OFFICER

11. The authority citation for part 26 is revised to read as follows:

Authority: 42 U.S.C. 3535(d).

12. Section 26.1 is amended by revising the second sentence to read as follows:

§ 26.1 Purpose.

* * * These rules of procedure apply to hearings with respect to determinations by the Multifamily Participation Review Committee pursuant to 24 CFR part 200, subpart H, to hearings conducted pursuant to referrals by debarring or suspending officials under 24 CFR part 24, and to hearings conducted pursuant to referrals by a hearing official under 24 CFR part 25, unless such regulations at 24 CFR

parts 24, 25, or 200, provide otherwise.

* * *

13. The authority citation for part 202 continues to read as follows:

Authority: 12 U.S.C. 1703, 1709, and 1715b; 42 U.S.C. 3535(d).

PART 202—APPROVAL OF LENDING INSTITUTIONS AND MORTGAGEES

14. In § 202.9, paragraph (a) is revised, and paragraphs (c) and (d) are removed, to read as follows:

§ 202.9 Administrative actions.

(a) *General.* Administrative actions that may be taken against Title I lenders

are set forth in § 25.5 of this title. Civil money penalties may also be imposed against Title I lenders in accordance with § 25.13 of this title and 24 CFR part 30. For purposes of this section, the term “lender” shall also include a loan correspondent as defined in § 202.2(b).

* * * * *

Dated: July 24, 1995.

Henry G. Cisneros,
Secretary.

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